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No. 84-1666

In the Supreme Court of the United States

OCTOBER TERM, 1985

ERNEST R. CUMMINGS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Fair Labor Standards Act, 29 U.S.C. 201 *et seq.*, requires that a Postal Service letter carrier be paid for his lunch period.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 751 F.2d 810. The opinion of the district court (Pet. App. 23a-43a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1984. A petition for rehearing was denied on January 22, 1985 (Pet. App. 20a-22a). The petition for a writ of certiorari was filed on April 22, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a United States Postal Service letter carrier, claims that the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.*, entitles him to wages for his lunch period.[1]

1. Petitioner is employed by the Postal Service as a letter carrier at the North Olmsted Post Office near Cleveland, Ohio (Pet. App. 3a). Petitioner arrives each morning at the post office in full uniform. His day begins with "office time," during which he prepares mail for delivery and signs out accountable items including a Postal Service key, and accountable mail, such as COD, postage due, registered, certified, and insured mail. He then proceeds to "street time," during which he delivers and accepts mail, and collects receipts and money for certain mail (*ibid.*).

Petitioner receives a one-half hour lunch break between 12:45 and 1:15 p.m. He has a choice of three lunch places selected by him and approved by his supervisors. His lunch period begins when he secures undelivered mail in the trunk of his vehicle and drives from his delivery route to an authorized lunch place by an authorized line of travel. The Postal Service does not pay petitioner during the one-half hour lunch period. Thus, petitioner clocks an eight and one-half hour work day but is paid for eight hours (Pet. App. 3a).

Petitioner remains responsible for the security of mail (including customs duty mail, postage due mail, COD mail, and special services mail) during lunch. However, this

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[1]This suit was brought initially by eight present and former postal employees, including petitioner. Approximately 12,000 postal employees consented to become plaintiffs pursuant to Section 16(b) of the Act, 29 U.S.C. 216(b) (Pet. App. 1a). The district court, upon agreement with the parties, considered only the petitioner's claim, treating it as typical of all plaintiffs' claims (*id.* at 2a).

responsibility is discharged by properly securing the mail prior to the lunch period. In addition, petitioner is responsible for, and carries to lunch, the following items:

(1) a list of the accountable mail that has not been delivered prior to lunch;

(2) receipts for the accountable mail that has been delivered prior to lunch; and

(3) money he may have collected from deliveries of COD mail prior to lunch.

Pet. App. 4a-5a. Petitioner is also responsible for his Postal Service key.

Postal regulations require letter carriers to be "courteous and obliging in the performance of duties," to furnish customers with postal information and postal forms, and to accept prepaid first-class mail from customers (Pet. App. 5a). In addition, letter carriers are subject to discipline for failure to secure mail in postal vehicles and relay boxes prior to lunch and for failure to exercise reasonable care for the items in their possession. On the other hand, city letter carriers are not required to accept mail from the public or otherwise conduct postal business during their meal periods and are not required to eat in their postal vehicle or to keep the vehicle in sight during lunch (*id.* at 5a-7a).

2. Petitioner brought suit in the United States District Court for the Northern District of Ohio, claiming that Section 7(a) of the FLSA, 29 U.S.C. 207(a), required the Postal Service to pay him for his lunch period.[2] The district

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[2]Section 7(a)(1), 29 U.S.C. 207(a)(1), requires employers to pay employees one and one-half times the normal hourly wage for hours worked beyond a 40-hour week. It provides:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is

court rejected this claim, holding that Section 7(a) does not require compensation because the restrictions on petitioner's lunch period do not interfere with the free disposition of his time. It found that petitioner had no substantial duties during lunch that would limit his private pursuits. The court concluded that the Postal Service therefore was not obligated to pay petitioner for his meal period (Pet. App. 38a, 42a).

The court of appeals affirmed (Pet. App. 1a-19a). The court agreed that petitioner's meal period was not compensable because he was not required to perform any substantial work activities during that time (*id.* at 13a).

ARGUMENT

The court of appeals correctly applied settled precedent to the facts of this case. Its judgment is consistent with the decisions of this Court and does not create a conflict with other courts of appeals. This Court's review is therefore unwarranted.

1. Contrary to petitioner's contentions (Pet. 13-29), the court of appeals correctly applied the decisions of this Court interpreting Section 7(a) of the FLSA. This Court has indicated that employees covered by Section 7(a) must be paid for all time spent in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business." *Tennessee Coal, Iron & R.R. Co.* v. *Muscoda Local No. 123*, 321 U.S. 590,

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employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Postal Service employees fall within the protection of this provision. See § 3(e)(2)(B), 29 U.S.C. 203(e)(2)(B).

598 (1944) (footnote omitted); see also *Jewell Ridge Coal Corp.* v. *Local No. 6167, United Mine Workers*, 325 U.S. 161 (1945). And the Court has ruled that Section 7(a) reaches occupation in a waiting or stand-by capacity "for the employer's benefit." *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133 (1944); accord *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 136-137 (1944). But the Court has never held that Section 7(a) requires compensation for all hours within the work day. Instead, the Court has stated that each case "must stand on its own facts." *Skidmore* v. *Swift & Co.*, 323 U.S. at 140. "Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged." *Id.* at 137.

Thus, the Court has recognized that Section 7(a) generally does not require compensation for eating and sleeping periods. In *Armour & Co.* v. *Wantock, supra*, the Court affirmed a judgment that company firefighters were entitled to compensation for time spent in a stand-by capacity except that "[u]sual hours for sleep and for eating * * * would not be counted * * *." 323 U.S. at 129. The Court identified the critical factor as "[w]hether time is spent predominantly for the employer's benefit or for the employee's * * *." *Id.* at 133. In *Skidmore* v. *Swift & Co., supra*, involving similar facts, the Court again declined to hold that Section 7(a) requires compensation for all standby time, relying on an administrative determination that eating and sleeping—

> are pursuits of a purely private nature which would presumably occupy the employees' time whether they were on duty or not and which apparently could be pursued adequately and comfortably in the required circumstances.

323 U.S. at 139.

These cases fully support the court of appeals' conclusion that Section 7(a) does not require compensation for petitioner's lunch period.[3] The court below carefully analyzed the responsibilities of the mail carrier during his lunch period and determined that the carrier is able to pursue his mealtime adequately and comfortably, is not engaged in the performance of substantial duties, and does not spend the time predominantly for the employer's benefit.[4] There is no reason for further review of this essentially fact-bound ruling. See *Tony & Susan Alamo Foundation* v. *Secretary of Labor*, No. 83-1935 (Apr. 23, 1985), slip op. 8.[5]

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[3]The court of appeals' conclusion is also supported by the Department of Labor's interpretation of its regulations, see 29 C.F.R. 785.19, defining a bona fide meal period. See Pet. App. 11a-12a, 13a-15a. The Department's interpretation is set forth in an opinion letter from the Deputy Administrator of the Wage and Hour Division of the Department of Labor in response to an inquiry from the National Association of Letter Carriers (*id.* at 13a-15a). As the court below recognized, "the opinion letter is entitled to some credence" (*id.* at 15a). See, *e.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Skidmore* v. *Swift & Co.*, 323 U.S. at 139-140.

[4]As the court of appeals noted (Pet. App. 15a), the fact that petitioner is responsible for mail secured in his vehicle during his meal period does not mean that this time is not his own. Nor does the limited selection of three authorized lunch places require compensation (*id.* at 15a-16a). Furthermore, petitioner's responsibility for those accountable items and receipts that he must carry with him during meals is not a substantial activity that interferes with his lunch period to the extent that Section 7(a) would require compensation (Pet. App. 16a). Finally, petitioner failed to show that he is subject to frequent or even occasional interruptions during his meals (*ibid.*). Such interruptions, in any event, would be considered a de minimis interference with his lunch time (*id.* at 17a-18a). See *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946).

[5]Petitioner's contention (Pet. 23-24) that the court below abandoned its own precedent is also without merit. Petitioner relies on *F. W. Stock & Sons, Inc.* v. *Thompson*, 194 F.2d 493 (6th Cir. 1952), in which the court held that lunch periods at a flour mill were compensable because the employees were required to eat while tending continuously operating machinery. The trial judge noted that "a man who has to oil

2. Petitioner contends (Pet. 29-35) that the court of appeals departed from the standards of the FLSA by relying on cases decided under provisions the Federal Employees Pay Act (FEPA), 5 U.S.C. 5544. However, as petitioner admits (Pet. 30), the court of appeals itself placed no reliance on FEPA cases; it merely rejected petitioner's challenge to the district court's reliance on FEPA precedent (Pet. App. 15a). Thus, the court of appeals' purported reliance on FEPA cases is, in fact, non-existent and provides no ground for this Court's review.

In all events, the district court's reliance on FEPA precedent was clearly proper in the present case. The FEPA, like the FLSA, requires overtime pay for work beyond a specified number of hours. See 5 U.S.C. 5544. In deciding whether meal or sleep periods constitute work under the FEPA, the Court of Claims originally looked to FLSA precedent for guidance. See *Armstrong* v. *United States*, 144 Ct. Cl. 659, 660-662, cert. denied, 361 U.S. 825 (1959) (relying on *Armour & Co.* v. *Wantock, supra*, and *Skidmore* v. *Swift & Co., supra*). It consistently applied the resulting principles to FEPA cases. See, *e.g.*, *Baker* v. *United States*, 218 Ct. Cl. 602, 619-621 (1978); *Bennett* v. *United States*, 194 Ct. Cl. 889, 902-903 (1971); *Bowling* v. *United States*, 181 Ct. Cl. 968, 980 (1967). Thus, the Court of Claims' FEPA precedents reflect this Court's rulings under the FLSA.[6]

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machinery with a sandwich in his hand is not having a free lunch period." 194 F.2d at 496. Thus, the facts in *F. W. Stock & Sons* differed markedly from those in the instant case.

[6]Petitioner is incorrect in suggesting (Pet. 33) that *Beebe* v. *United States*, 640 F.2d 1283 (Ct. Cl. 1981), renders FEPA precedent inapplicable to FLSA claims. That case holds that federal firefighters' meal periods are compensable under Section 7(k) of the FLSA, 29 U.S.C. 207(k). The instant case involves postal workers covered under Section 7(a). See pages 3-4 note 2, *supra*. Petitioner neglects to mention that "the overtime pay provisions of the FLSA applicable to federal firefighters differ significantly from the FLSA overtime pay provisions for

3. Finally, petitioner asserts (Pet. 36-40) that the court of appeals deprived him of the same application of the FLSA afforded employees in the private sector. This argument is based upon a mischaracterization of the court of appeals' decision. Petitioner claims that "[a]fter finding that petitioner is engaged in work throughout his lunch period, [the court], nonetheless, held that he was not entitled to compensation" and thereby applied a "new standard" to this case (Pet. 36-37). In fact, the court below carefully analyzed petitioner's responsibilities during his lunch period, found that he did not engage in the performance of any substantial duties, and therefore concluded that he did not "work" within the meaning of the FLSA (Pet. App. 15a-17a). The court thus applied established FLSA precedent to the facts of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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most other federal employees." *Beebe*, 640 F.2d at 1286. Indeed, federal regulations specify that firefighters' meal periods should generally be treated as compensable hours of work. 29 C.F.R. 553.15. See *Beebe*, 640 F.2d at 1289-1290. Thus, *Beebe* does not support the broad position that petitioner suggests and is quite irrelevant to the subsection of the FLSA involved in this case.